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No. 89-372

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

AMANDA ACQUISITION CORPORATION,

Petitioner,

v.

UNIVERSAL FOODS CORPORATION, ALAN R. ANDERSON, MICHAEL E. BATTEN, DR. OLAN D. FORKER, DR. CAROL I. WASLIEN GHAZAII, LEON T. KENDALL, PAUL L. KOHNSTAMM, CHARLES S. MCNEER, ORVILLE R. MEERTZ, JOHN L.MURRAY, DR. BERNARD S. SCHWEIGERT, GUY A. OSBORN, GERARD E. VENEMAN and DARRELL E. WILDE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT WISCONSIN ATTORNEY GENERAL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is section 180.726 of the Wisconsin Statutes consistent with the Supremacy Clause?

2. Is section 180.726 of the Wisconsin Statutes consistent with the Commerce Clause?

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STATEMENT OF THE CASE

The United States Court of Appeals for the Seventh Circuit held on May 24, 1989, that section 180.726 of the Wisconsin Statutes ("the Wisconsin statute") is consistent with the Commerce Clause and the Supremacy Clause. Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir. 1989). That decision affirmed a decision of the United States District Court for the Eastern District of Wisconsin entered on March 18, 1989, and reported at 708 F. Supp. 984.

The Wisconsin statute, commonly known as a "business combination statute," imposes limitations upon a shareholder which, without first obtaining the approval of the corporation, acquires ten percent or more of a Wisconsin corporation's outstanding stock and thereupon seeks to initiate certain fundamental corporate changes. The statute provides that:

> [A] resident domestic corporation may not engage in a business combination with an interested stockholder of the resident domestic corporation for 3 years after the interested stockholder's stock acquisition date unless the board of directors of the resident domestic

> corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock made by the interested stockholder on that stock acquisition date.

Sec. 180.726(2), Stats. The statute defines "interested stockholder" as a stockholder owning ten percent or more of the outstanding voting stock of a resident domestic corporation. Sec. 180.726(1)(j)1., Stats. The stockholder's "stock acquisition date" is the date on which it first becomes an "interested stockholder" by acquiring ten percent or more of the corporation's voting stock. Sec. 180.726(1)(n), Stats.

The provisions of the statute are applicable only to Wisconsin corporations with close ties to the state. A subject "resident domestic corporation" is one that: (1) is organized under the laws of this state and has its principal executive offices and significant business operations located in this state; and (2) has more than ten percent of its voting stock owned beneficially by residents of this state or more than ten percent of the holders of record of its stock are residents of this state. Sec. 180.726(1)(L)1., Stats.

The statute confines "business combinations" to self-dealing transactions with the ten percent stockholder, or its affiliates or associates. Sec. 180.726(1)(e), Stats. Among the proscribed transactions are: (i) any merger or consolidation with the ten percent stockholder; (ii) sales, leases or transfers of assets to the dominating stockholder; (iii) issuance or transfer of stock by the resident domestic corporation; (iv) liquidation or dissolution of the resident domestic corporation; or (v) any transaction which has the effect of increasing the proportion of voting securities of the corporation held by the ten percent stockholder. Sec. 180.726(1)(e), Stats. Accordingly, an interested stockholder which acquires ten percent or more of a corporation's stock without advance approval of its board of directors must wait three years before proposing any of the foregoing transactions with the target corporation. In sum, the statute regulates only limited transactions between a corporation and dominating stockholders.

The Seventh Circuit, finding no conflict between the Wisconsin statute and the Williams Act, held that the

Supremacy Clause was not violated. Finding also that the Wisconsin statute treated all bidders and investors alike, regardless of residence, while legitimately governing internal corporate affairs, the Court concluded that the Wisconsin statute is consistent with the Commerce Clause.

Petitioner's supplemental brief advises the Court that petitioner has allowed its tender offer for respondent's shares to expire. Serious mootness concerns would appear to be at issue. The Wisconsin Attorney General leaves it to petitioner and respondent to argue to the Court the mootness issues.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 17.1 provides that review on writ of certiorari "will be granted only when there are special and important reasons therefor." The rule further provides that conflict with applicable decisions of this Court or a decision of another federal court of appeals on the same matter, or the presence of an important federal issue which has not been, but should be, settled by this Court, are indicative of the character of reasons that will be considered

in granting review. No such reasons justifying review exist in the instant case.

I. THE SEVENTH CIRCUIT'S HOLDING THAT THE WISCONSIN STATUTE DOES NOT VIOLATE THE SUPREMACY CLAUSE IS GROUNDED FIRMLY IN THIS COURT'S RECENT CTS[1] DECISION.

The Seventh Circuit has been in the eye of the litigation storm surrounding three generations of state corporate takeover laws. No court could be in a better position to develop an accurate reading of this Court's direction relative to the constitutionality of such legislation.

In MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), the Seventh Circuit accurately anticipated this Court's negative reaction to Illinois' first-generation statute, which permitted state enjoinder of a tender offer pending approval of the offer by a state public official. Edgar v. MITE Corp., 457 U.S. 624 (1982).

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[1]CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 107 S. Ct. 1637 (1987).

In Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), however, the Seventh Circuit went too far in striking down Indiana's second-generation statute. The Indiana statute, which mandated the loss of an acquiror's voting power unless approved by the target's directors or shareholders, removed the state official approval requirement and applied only to Indiana corporations. This Court reversed the Seventh Circuit in CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, holding that the Indiana statute is consistent with both the Supremacy Clause and the Commerce Clause.

The CTS decision provides clear delineation of the constitutional boundaries of state corporate takeover laws. Since CTS, about half the states have enacted "business combination" laws similar to the law at issue here. As recognized by the Seventh Circuit, the states have conformed these laws to the constitutional requirements set forth in this Court's CTS decision.

This Court noted with alarm that a host of "state corporate laws of hitherto unquestioned validity" would be

imperiled if the Williams Act "were construed to preempt any state statute that may limit or delay the free exercise of power after a successful tender offer." CTS, 107 S. Ct. at 1647.[2] The Court found this result unwarranted by either the history or purposes of the Williams Act: "The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly." CTS, 107 S. Ct. at 1648.

The Court reiterated in CTS its longstanding view that the purpose of the Williams Act is full disclosure and elemental procedural fairness in the share tendering

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[2]Among such provisions noted by the Court are super-majority provisions applicable to mergers, which impede the freeze out of minority shareholders, staggered board of director terms, which impede gaining full control of a corporation, and cumulative voting provisions, which enable minorities to secure board representation. CTS, 107 S. Ct. at 1647-48.

process.[3] CTS, 107 S. Ct. at 1644. See also Schreiber v. Burlington Northern, Inc., 472 U.S. 1 (1985); Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 30-31 (1977). "[I]t [is] clear that the legislation was designed solely to get needed information to the investor . . . ." Rondeau v. Mosinee Paper Corporation, 422 U.S. 49, 58 (1975).

In CTS, the Court acknowledged that the Williams Act does not prevent the states from regulating the tender offer process in ways which do not conflict with the provisions of the federal act. "'[I]t is a big leap from saying that the Williams Act does not itself exhibit such hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations . . . .'" CTS, 107 S. Ct. at 1643 (quoting from Dynamics Corp. of America v. CTS Corp., 794 F.2d at 262). The Court in CTS refused to take that leap.

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[3]In addition to the Act's disclosure rules, Congress enacted rules on the right to withdraw previously tendered shares and pro-ration of payment among tendered shares where the offer is over-subscribed.

It has also been asserted that a purpose of the Williams Act is to foster "shareholder autonomy." This approach--at odds with the CTS majority decision--is expounded in Justice White's statement in his dissent that the Indiana Act, "by design, will frustrate individual investment decisions." Id. at 1654. The majority opinion in CTS, however, recognized that it is state law which defines the contract between the corporation and its shareholders. Id. at 1649-52 (citing Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). The settled policy of Wisconsin, as reflected in its corporation law, has been that a corporation's directors must initially determine whether a business combination is in the best interest of a corporation and its stockholders. Secs. 180.30, 180.62 and 180.63, Stats. Neither Congress nor the Court in CTS decreed that stockholders must now supplant directors under a new banner of "shareholder autonomy." In actuality, the CTS Court approvingly noted that the challenged Indiana statute fostered shareholder autonomy. Nothing in the CTS opinion supports the argument that the

Court, in so describing the operation of the Indiana statute, either articulated a purpose of the Williams Act or created a new standard to invalidate corporate governance measures which inhibit takeovers.

Even assuming arguendo that the policy of the Williams Act is "shareholder autonomy," the Wisconsin law furthers that policy. In enacting the Williams Act, Congress recognized that an informed shareholder may wish to hold and not to tender his shares. See H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2-3, reprinted in II Federal Securities Laws Legislative History 1934-1982 2123, 2124-25; S. Rep. No. 550, 90th Cong., 2d Sess. 3, reprinted in II Federal Securities Laws Legislative History 1934-1982 2107, 2109. The Wisconsin statute limits an acquiror's post-tender ability to negate that shareholder choice.

Nowhere in the language, the rules or the legislative history of the Williams Act is there any suggestion that Congress intended to guarantee that bidders were entitled as a matter of federal law to force a purchase of 100% of the outstanding equity securities of a corporation. To the

contrary, Congress merely sought to assure that shareholders could make a thoughtful decision whether to tender or whether to hold their shares. The Wisconsin statute allows shareholders to effectuate that decision within a constitutionally protected framework.

With the enactment of sec. 180.726, Wisconsin has exercised its constitutional right to define the powers of domestic corporations in a way that allows shareholders who do not want to be herded into giving up their equity investment to hold on and to continue to participate in the economic enterprise. The fact that some acquirors may prefer not to consummate their takeovers unless state law permits them to abuse constitutionally established corporate powers -- and constitutionally established limits on those powers -- frustrates no purpose of the Williams Act. To the contrary, Wisconsin has furthered those interests.

Over the years, this Court has recognized that state law is the source of law governing "the relationships among or between the corporation and its current officers,

directors, and shareholders." MITE, 457 U.S. at 645. This principle is recognized as the internal affairs doctrine.

In CTS, the Court found that the circumstances under which a corporation may or may not engage in certain business combinations are among the corporate governance issues that fall most clearly within the scope of the internal affairs doctrine. ("Mergers are a typical example" of "laws regulating corporate governance.") CTS, 107 S. Ct. at 1650.

In regulating business combinations, the Wisconsin statute is not unique as a corporate governance provision which affects the relative ease of asserting influence or control over a Wisconsin corporation once a substantial block of shares has been acquired. For example, secs. 180.62, et seq., provide that in some instances a plan of merger or consolidation shall be adopted only if initially proposed by the board of directors and then approved by a two-thirds vote of shareholders. (In other instances, a majority vote is required.) Similar board initiation and stockholder vote are required for a "sale, lease, exchange or other disposition of all, or substantially all, the property and

assets of a corporation" not in the regular course of its business. Sec. 180.71, Stats.

The Wisconsin Business Corporation Law includes other provisions which impact on the bidder for corporate control. Examples include provisions which permit: (1) a board of directors to be divided into classes (hence requiring up to three years to remove all incumbent board members), sec. 180.33, Stats.; (2) the issuance of special classes of stock which can be used to give existing shareholders costly rights and options in the event of a change of control, sec. 180.155, Stats.; and (3) the exercise of appraisal rights to dissenters in any merger, sec. 180.72, Stats.

These provisions unmistakably hamper the freedom of contestants for corporate control. Petitioner's argument, if accepted by this Court, would make the federal courts the arbiters of such state laws under the banner of upholding "neutrality." This Court rejected this invitation in CTS, 107 S. Ct. at 1647: "Finally, we note that the Williams Act would preempt a variety of state corporate laws of hitherto unquestioned validity if it were construed to preempt any

state statute that may limit or delay the free exercise of power after a successful tender offer." The Court should decline to consider federalizing a significant portion of the law relating to internal corporate affairs in contravention of the policies recently articulated in CTS.

II. THE SEVENTH CIRCUIT'S HOLDING RELATIVE TO THE COMMERCE CLAUSE HAS A SIMILARLY SOLID FOUNDATION IN THE CTS DECISION.

Nothing in the Commerce Clause requires Wisconsin to design laws concerning corporate mergers or other corporate governance issues in any particular way. The Court has recognized that "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations . . . ." CTS, 107 S. Ct. at 1649. Indeed, the federal government has never adopted a national corporation code, but has left the development of business corporation laws to the states, which exercise this power by creating corporations and by determining the rights and obligations of their various

constituencies. As Chief Justice Marshall stated in Trustees of Dartmouth College, 17 U.S. at 636:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

(Quoted in CTS, 107 S. Ct. at 1649-50.)

The Court in CTS observed that it is "an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." CTS, 107 S. Ct. at 1650. The Court has respected the autonomy of the states in acting upon such matters of local concern, Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977); Cort v. Ash, 422 U.S. 66 (1975),[4] and has refused

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[4]As the Court stated in Kassel v. Consolidated Freightways Corp. Etc., 450 U.S. 662, 670 (1981), "a State's power to regulate commerce is never greater than in matters traditionally of local concern."

to assess the "economic wisdom" or "ultimate economic efficacy" of these measures. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25 (1978).

The Court has made it abundantly clear that this respect extends to Commerce Clause challenges to a state's exercise of its corporate governance authority: "We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." CTS, 107 S. Ct. at 1649.

Thus, in assessing the challenge to the Indiana statute governing corporate takeovers, the Court, in CTS, found that it was inappropriate to weigh the benefits of the statute against its impact on interstate commerce. The Court recognized that state statutes concerning corporate governance do not contravene the Commerce Clause merely because they affect interstate commerce. Indeed, the Court noted that "[b]y prohibiting certain transactions, and regulating others, such [state] laws necessarily affect certain

aspects of interstate commerce." 107 S. Ct. at 1650 (emphasis added). Nevertheless, the Court concluded that any incidental effect on commerce was wholly justified:

> Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation--except in the rarest situations--is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

CTS, 107 S. Ct. at 1650. In fact, the Court explicitly recognized in this same context that state corporate laws are valid despite the fact that, in many instances, they make it difficult for corporations to merge:

> These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, e.g., MBCA § 73 (requiring approval of a merger by a majority

> of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge.

CTS, 107 S. Ct. at 1650.[5]

An assertion that the Wisconsin statute is unconstitutional because it allegedly deters interstate tender offers for the stock of Wisconsin domestic corporations will not wash. In CTS, 107 S. Ct. at 1650 n.12, the Court specifically recognized that provisions such as the Wisconsin statute, could affect stockholders across state boundaries: "Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these

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[5]The Court pointed out that there are numerous other regulations common to the states which may inhibit a corporation from engaging in a specified transaction. These include: (1) requiring a super majority vote to approve the sale of the corporation's assets; (2) the right of dissenters to sell their shares to the corporation at fair market value; (3) staggering the election of directors to prevent abrupt changes in management; (4) restrictions on payments of dividends to ensure specified ratios of assets to liabilities; and (5) the classification of stock with different voting rights on liquidation. CTS, 107 S. Ct. at 1650 n.12.

and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled." Nevertheless, the Court held that even if the statute should decrease the number of such tender offers for Indiana corporations, "this would not offend the Commerce Clause." CTS, 107 S. Ct. at 1652.

Thus, because Wisconsin has the right to create and define the property rights of its corporations which are for sale in interstate commerce, the Wisconsin statute is not subject to a challenge under the Commerce Clause on the ground that its impact on interstate commerce outweighs its benefits. Rather, under the standard employed by the Court in CTS, the Commerce Clause only prohibits a state, in exercising its authority to regulate corporate governance, from discriminating against sister states and their residents and from burdening interstate commerce with conflicting and overlapping state regulations. The Wisconsin statute satisfies both of these criteria.

A. The Wisconsin statute "regulates even-handedly" and does not discriminate against interstate commerce.

The Court, in CTS, noted that the "principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." 107 S. Ct. at 1648. The Wisconsin statute easily passes this fundamental test. It regulates even-handedly and does not discriminate against interstate commerce. The provisions of the statute affect only business combinations involving Wisconsin corporations and apply equally to resident and nonresident interested shareholders. Indeed, the statute defines "interested stockholders" without any reference to state citizenship. See sec. 180.726(1)(j)1., Stats.

Thus, nothing in the Wisconsin statute imposes a greater burden on out-of-state offerors than it does on similarly-situated Wisconsin offerors. As the Court indicated in Kassel, 450 U.S. at 675, state laws which do not discriminate against interstate commerce are entitled to "special deference." See also Exxon Corp., 437 U.S. at

125-26; Huron Portland Cement Co. v. City of Detroit, Mich., 362 U.S. 440, 448 (1960).

B. The Wisconsin statute does not overlap with other states' laws and will therefore not subject corporations to inconsistent regulations.

The Court observed in CTS that state regulations have been invalidated under the Commerce Clause which "adversely may affect interstate commerce by subjecting activities to inconsistent regulations." 107 S. Ct. at 1649 (citing Brown-Forman Distillers v. N. Y. Liquor Auth., 476 U.S. 573 (1986); MITE, 457 U.S. at 624; Kassel, 459 U.S. at 671). In CTS, the Court found that the Indiana Act "poses no such problems," stating that "[s]o long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State." 107 S. Ct. at 1649.

The Wisconsin statute is similarly designed to prevent the possibility of inconsistent or overlapping regulations. It applies only to corporations organized under

the laws of Wisconsin which have executive offices and significant business operations in Wisconsin and a substantial number of Wisconsin shareholders. See sec. 180.726(1)(L)1., Stats. The statute does not purport to regulate foreign corporations doing business in Wisconsin. Thus, the statute does not have the "sweeping extraterritorial effect" which led the plurality in MITE to conclude that if the Illinois Act were upheld, interstate commerce in securities transactions generated by tender offers would be "thoroughly stifled." 457 U.S. at 642. Like the Indiana statute challenged in CTS, the Wisconsin statute "does not create an impermissible risk of inconsistent regulation by different States." 107 S. Ct. at 1649.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

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